

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 18-2842

U.S. DEPARTMENT OF
HOMELAND SECURITY,
245 Murray Lane SW
Washington, DC 20528

U.S. CUSTOMS AND
BORDER PROTECTION,
1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. IMMIGRATION & CUSTOMS
ENFORCEMENT
500 12th Street SW
Washington, DC 20536-5009

and

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES,
20 Massachusetts Avenue NW
Washington, DC 20529-2120

Defendants.

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Homeland Security, the U.S. Customs and Border Protection, the U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendants have failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agencies from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government

through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Homeland Security (“DHS”) is a department of the executive branch of the U.S. government headquartered in Washington, D.C., and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The DHS Privacy Office (“DHSHQ”) coordinates FOIA requests for several DHS components, including the Office of the Secretary and Deputy Secretary, the Office of the Executive Secretary, The Office of Intergovernmental Affairs, the Management Directorate, the Office of Policy, the Office of Legislative Affairs, and the Office of Public Affairs. DHS has possession, custody, and control of the records that American Oversight seeks.

7. Defendant U.S. Customs and Border Protection (“CBP”) is a component of DHS and is also headquartered in Washington, DC. CBP has possession, custody, and control of the records that American Oversight seeks.

8. Defendant U.S. Immigration and Customs Enforcement (“ICE”) is a component of DHS and is also headquartered in Washington, DC. ICE has possession, custody, and control of the records that American Oversight seeks.

9. Defendant U.S. Citizenship and Immigration Services (“USCIS”) is a component of DHS and is also headquartered in Washington, DC. USCIS has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

External Communications FOIA

10. On June 20, 2018, American Oversight submitted a FOIA request to DHS, CBP, ICE, and USCIS seeking access to the following records:

All email communications with any of the following individuals/ organizations, including messages where custodians or outside individuals/organizations were carbon copied or blind carbon copied. This request includes all prior messages (whether incoming or outgoing) reflected in any responsive emails and any attachments to any responsive emails.

- a. Federation for American Immigration Reform (including any emails sent to or received from an address ending in @fairus.org)
- b. Immigration Reform Law Institute (including any emails sent to or received from an address ending in @irli.org)
- c. Center for Immigration Studies (including any emails sent to or received from an address ending in @cis.org)
- d. NumbersUSA (including any emails sent to or received from an address ending in @numbersusa.com)
- e. The Remembrance Project (including any emails sent to or received from an address ending in @theremembranceproject.org)
- f. Heritage Foundation (including any emails sent to or received from an address ending in @heritage.org)
- g. Kris Kobach (including but not limited to emails sent to or received from kkobach@gmail.com, kris@kriskobach.com, or any emails he sent from an address ending in @ks.gov)
- h. Hans von Spakovsky (including but not limited to emails sent to or received from hans.vonspakovsky@heritage.org)
- i. Jason Richwine (including but not limited to emails sent to or received from Jason.richwine@gmail.com)
- j. Jessica Vaughan (including but not limited to emails sent to or received from jmv@cis.org)
- k. Mark Krikorian (including but not limited to emails sent to or received from msk@cis.org)
- l. Steven Camerota (including but not limited to emails sent to or received from sac@cis.org)
- m. Dan Stein (including but not limited to emails sent to or received from dstein@fairus.org)
- n. Lori Wood (including but not limited to emails sent to or received from lwood@fairus.org)
- o. Bob Dane (including but not limited to emails sent to or received from bdane@fairus.org)
- p. RJ Hauman (including but not limited to emails sent to or received from rjhauman@fairus.org)
- q. Heather Ham-Warren (including but not limited to emails sent to or received from hham@fairus.org)
- r. Robert Najmulski (including but not limited to emails sent to or received from rnajmulski@fairus.org)
- s. Roy Beck
- t. Rosemary Jenks

- u. Dale Wilcox (including but not limited to emails sent to or received from dwilcox@irli.org)
- v. Sarah Rehberg (including but not limited to emails sent to or received from sreberg@irli.org)
- w. Maria Espinoza (including but not limited to emails sent to or received from maria@theremembranceproject.org)

For DHSHQ, the search may be limited to the following custodians:

- i. John Kelly;
- ii. Kirstjen Nielsen;
- iii. Chad Wolf;
- iv. Christina Bobb;
- v. John Mitnick;
- vi. Miles Taylor;
- vii. Michael Dougherty; and
- viii. Julie Kirchner (USCIS Ombudsman).

For ICE, the search may be limited to the following custodians:

- i. Thomas Homan;
- ii. Thomas Blank; and
- iii. John Feere.

For CBP, the search may be limited to the following custodians:

- i. Kevin McAleenan, Commissioner;
- ii. Julie Kirchner;
- iii. Ronald Vitiello, Acting Deputy Commissioner; and
- iv. Carla Provost, Acting Chief, United States Border Patrol.

For USCIS, the search may be limited to the following custodians:

- i. L. Francis Cissna; and
- ii. Jennifer P. Higgins, Associate Director, Refugee, Asylum and International Operations.

The request sought all responsive records from January 20, 2017, through the date of the search.

11. CBP assigned the Expert Communications FOIA tracking number CBP-2018-065315.

12. DHS assigned the Expert Communications FOIA reference number 2018-HQFO-01113.

13. DHS assigned the Expert Communications FOIA reference number 2018-ICFO-50821.

Port of Entry Communications FOIA

14. Also on June 20, 2018, American Oversight submitted a FOIA request to CBP seeking access to the following records:

1. All email communications sent to or by any of the following individuals:
 - a. Sidney Aki, Port Director, San Ysidro Port of Entry;
 - b. Sally Carrillo, Assistant Port Director, San Ysidro Port of Entry; and
 - c. Robert Hood, Assistant Port Director, San Ysidro Port of Entry.

This request should be limited to the following inclusive date ranges:

- i. September 9 through 12, 2017;
 - ii. November 1 and 2, 2017;
 - iii. November 10 through 13, 2017; and
 - iv. November 16 and 17, 2017.
2. All email communications sent to or by Carlos C. Rodriguez, Port Director, Hidalgo Port of Entry, on November 7 and 8, 2017.

Both items of this request seek all prior messages (whether incoming or outgoing) reflected in any responsive emails and any attachments to any responsive emails.

15. CBP assigned the Port of Entry Communications FOIA tracking number CBP-2018-065316. The tracking number was subsequently changed to CBP-OIT-2018-0653.

Immigration Group Communications FOIA

16. On July 25, 2018, American Oversight submitted a FOIA request to CBP seeking access to the following records:

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar entries/invitations, meeting notices, meeting agendas, informational material, draft

legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between or among (including those copied or blind copied) anyone listed in Column A below and anyone listed in Column B below:

Column A: DHS Officials	Column B: Outside Entities
<ul style="list-style-type: none"> • Sidney Aki, Port Director of U.S Customs and Border Protection at San Ysidro Port of Entry; • Sally Carrillo, Assistant Port Director at San Ysidro Port of Entry; • Robert Hood, Assistant Port Director at San Ysidro Port of Entry; • Pete Flores, Director of Field Operations for San Diego and Imperial Counties; • Toby Don Sosbee, Border Community Liaison at San Diego Field Office; • Johnny Armijo, Assistant Director of Border Security San Diego Field Office; • Andrea Granados, Border Security Coordinator at San Diego Field Office; • Claudia Taitague, Border Security Coordinator at San Diego Field Office; • Terence L. Shigg, Border Patrol Agent; • Robert Lopez, Border Patrol Agent; • Thomas Ward Jr., Border Patrol Agent; • Joshua Wilson, Border Patrol Agent; • Manny Bayon, Border Patrol Agent; and • Chris Bauder, Border Patrol Agent. 	<ul style="list-style-type: none"> • Jeff Schwilk; • Robin Hvidston; • Joe Gomez; • Maria Espinoza; • Brandon Darby; • Bob Price; • Anyone at or affiliated with Federation for American Immigration Reform, including, but not limited to, anyone whose email address ends in @fairus.org; • Anyone at or affiliated with Center for Immigration Studies, including but not limited to, anyone whose email address ends in @cis.org; • Anyone at or affiliated with NumbersUSA, including but not limited to, anyone whose email address ends in @numbersusa.com; • Anyone at or affiliated with Californians for Population Stabilization, including but not limited to, anyone whose email address ends in @capsweb.org; • Anyone at or affiliated with We The People Rising, including but not limited to, anyone whose email address ends in @wethepeoplerising.com; • Anyone at or affiliated with The Remembrance Project, including but not limited to, anyone whose email address ends in @theremembranceproject.org; or • Anyone at or affiliated with Breitbart News Network, including but not limited to, anyone whose email address ends in @breitbart.com.

The request sought all responsive records from January 20, 2017, through the date of the search.

17. CBP assigned the Immigration Group Communications FOIA request tracking number CBP-2018-073709.

Further External Communications FOIA

18. On October 18, 2018, American Oversight submitted a FOIA request to DHS and USCIS seeking access to the following records:

1. For each identified custodian below, all email communications with any of the following individuals/organizations, including messages where custodians or outside individuals/organizations were carbon copied (cc) or blind carbon copied (bcc). This request includes all prior messages (whether incoming or outgoing) reflected in any responsive emails and any attachments to any responsive emails.
 - a. Federation for American Immigration Reform (including any emails sent to or received from an address ending in @fairus.org)
 - b. Immigration Reform Law Institute (including any emails sent to or received from an address ending in @irli.org)
 - c. Center for Immigration Studies (including any emails sent to or received from an address ending in @cis.org)
 - d. NumbersUSA (including any emails sent to or received from an address ending in @numbersusa.com)
 - e. The Remembrance Project (including any emails sent to or received from an address ending in @theremembranceproject.org)
 - f. Heritage Foundation (including any emails sent to or received from an address ending in @heritage.org)
 - g. Kris Kobach (including but not limited to emails sent to or received from kkobach@gmail.com, kris@kriskobach.com, or any emails he sent from an address ending in @ks.gov)
 - h. Hans von Spakovsky (including but not limited to emails sent to or received from hans.vonspakovsky@heritage.org)
 - i. Jason Richwine (including but not limited to emails sent to or received from Jason.richwine@gmail.com)
 - j. Jessica Vaughan (including but not limited to emails sent to or received from jmv@cis.org)
 - k. Mark Krikorian (including but not limited to emails sent to or received from msk@cis.org)

- l. Steven Camerota (including but not limited to emails sent to or received from sac@cis.org)
 - m. Dan Stein (including but not limited to emails sent to or received from dstein@fairus.org)
 - n. Lori Wood (including but not limited to emails sent to or received from lwood@fairus.org)
 - o. Bob Dane (including but not limited to emails sent to or received from bdane@fairus.org)
 - p. RJ Hauman (including but not limited to emails sent to or received from rjhauman@fairus.org)
 - q. Heather Ham-Warren (including but not limited to emails sent to or received from hham@fairus.org)
 - r. Robert Najmulski (including but not limited to emails sent to or received from rnajmulski@fairus.org)
 - s. Roy Beck
 - t. Rosemary Jenks
 - u. Dale Wilcox (including but not limited to emails sent to or received from dwilcox@irli.org)
 - v. Sarah Rehberg (including but not limited to emails sent to or received from sreberg@irli.org)
 - w. Maria Espinoza (including but not limited to emails sent to or received from maria@theremembranceproject.org)
2. All email communications containing any of the following terms:
 - a. “American Academy of Pediatrics”
 - b. AAP
 - c. Merkley
 - d. “Prosecution initiative”
 3. All email communications that contain any of the terms in Column A and any of the terms in Column B:

Column A	Column B
a. Separat*	b. Famil* c. Parent* d. Guardian* e. FMUA

4. All email communications that contain any of the terms in Column C and any of the terms in Column D:

Column C	Column D
<ul style="list-style-type: none"> a. ACLU b. “zero tolerance” c. Asylum d. “credible fear” e. 1158 	<ul style="list-style-type: none"> f. Separat* g. Deter* h. Famil* i. Parent* j. Kid* k. Child* l. Mother* m. Father* n. Guardian* o. UAC* p. UC* q. FMUA

Please note that American Oversight is using the asterisk (*) to designate the standard use of “wildcards” in the search for responsive records. For example, a search for “separat*” would return all of the following: separate, separates, separated, separation, etc. If your agency is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

DHS may limit its search to the following custodians:

- i. Gene Hamilton
- ii. Cameron Quinn

USCIS may limit its search to the following custodians:

- i. Robert Law

The request sought all responsive records from January 20, 2017, through the date of the search.

- 19. DHS assigned this request tracking number 2019-HQFO-00076.
- 20. USCIS has not acknowledged this request.

MCAT Structure FOIA

21. Also on October 18, 2018, American Oversight submitted a FOIA request to CBP seeking access to the following records:

- 1. Records sufficient to identify all members of the CBP Migration Crisis Action Team (MCAT, including their name, title, pay grade, and whether they are career or political employees. If members are outside of CBP, at minimum, we request those persons’ names and

agency affiliations, as well as agency component affiliations if known. To the extent private contractors outside of CBP are members of MCAT, we request those persons' or companies' names and affiliations.

2. Records sufficient to identify all persons within the Office of the Commissioner to whom MCAT reports or who is managing or otherwise overseeing MCAT.
3. All agendas prepared for all meetings of MCAT.

CBP should provide all responsive records from January 20, 2017, through the date of search.

We believe that CBP is in the best position to identify the custodians of responsive records. However, we request that CBP at a minimum search the records of every political appointee in the:

- Office of the Commissioner*;
- Office of the Deputy Commissioner*;
- Office of the Executive Director for Policy;
- Office of the Chief of U.S. Border Patrol.

*The CBP website suggests that the chiefs of staff for these two offices are themselves separate offices. To the extent that the "Chief of Staff to the Commissioner" and the "Chief of Staff to the Deputy Commissioner" are independent offices, we ask that both of those offices be searched too.

"Political appointee" should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

22. CBP initially assigned the MCAT Structure FOIA request tracking number CBP-2019-004738. CBP thereafter changed the tracking number to CBP-OC-2019-004738.

MCAT Communications FOIA

23. Also on October 18, 2018, American Oversight submitted a FOIA request to CBP seeking access to the following records:

All email correspondence, including attachments, containing the term “MCAT” or “Migration Crisis Action Team” from January 20, 2017, through April 30, 2017, in the following offices:

- Office of the Commissioner*;
- Office of Congressional Affairs;
- Office of the Executive Assistant Commissioner for Field Operations; and
- Office of the Chief of U.S. Border Patrol.

*The CBP website suggests that the chief of staff for this office is itself a separate office. To the extent that the “Chief of Staff to the Commissioner” is its own office, we ask that this office be searched too.

24. CBP assigned the MCAT Communications FOIA tracking number CBP-2019-004726. The tracking number was subsequently changed to CBP-OIT-2019-004726.

McAllen FOIA

25. Also on October 18, 2018, American Oversight submitted a FOIA request to CBP seeking access to the following records:

1. All photographs, videos, or audio recordings taken by any USBP employee at the Central Processing Station in McAllen, Texas, between April 1, 2018, and July 1, 2018.
2. All photographs, videos, or audio recordings taken between April 1, 2018, and July 1, 2018, and stored on the government-owned mobile devices of any supervisory USBP employee working at the Central Processing Station in McAllen, Texas, in that date range.

CBP is best able to identify the custodians for this search, but we request that CBP at the minimum search paper files, electronic files, and mobile devices of:

- A. Rio Grande Valley Sector Chief Patrol Officer Manuel Padilla, Jr.
- B. Rio Grande Valley Sector Deputy Chief Patrol Officer Raul L. Ortiz
- C. All supervisory employees stationed at the Central Processing Station in McAllen, Texas, between April 1, 2018, and July 1, 2018.

26. CBP assigned the McAllen FOIA tracking number CBP-2019-004718.

Exhaustion of Administrative Remedies

27. As of the date of this Complaint, DHS, CBD, ICE, and USCIS have failed to (a) notify American Oversight of any determination regarding American Oversight's FOIA requests, including the full scope of any responsive records the agencies intend to produce or withhold and the reasons for any withholdings; or (b) produce all of the requested records or demonstrate that the requested records are lawfully exempt from production.

28. Through Defendants' failure to make determinations as to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

29. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

30. American Oversight properly requested records within the possession, custody, and control of Defendants.

31. Defendants are agencies subject to and within the meaning of FOIA and must therefore make reasonable efforts to search for requested records.

32. Defendants have failed to promptly and adequately review agency records for the purpose of locating those records which are responsive to American Oversight's FOIA requests.

33. Defendants' failure to conduct adequate searches for responsive records violates FOIA.

34. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to conduct adequate searches for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

35. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

36. American Oversight properly requested records within the possession, custody, and control of Defendants.

37. Defendants are agencies subject to and within the meaning of FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

38. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce records responsive to its FOIA requests.

39. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

40. Defendants' failure to provide all non-exempt responsive records violates FOIA.

41. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests identified in this Complaint;
- (2) Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: December 4, 2018

Respectfully submitted,

/s/ Joseph F. Yenouskas

Joseph F. Yenouskas (D.C. Bar No. 414539)
GOODWIN PROCTER LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 346-4143
JYenouskas@goodwinlaw.com

/s/ Glenn S. Kerner

Glenn S. Kerner (*pro hac vice* pending)
GOODWIN PROCTER LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018

(212) 813-8800
GKerner@goodwinlaw.com

/s/ Austin R. Evers

Austin R. Evers (D.C. Bar No. 1006999)

AMERICAN OVERSIGHT

1030 15th Street NW, B255

Washington, DC 20005

(202) 869-5245

austin.evers@americanoversight.org

Counsel for Plaintiff American Oversight